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No. 84-1581

IN THE

Supreme Court of the United States

October Term, 1984

SEALY, INCORPORATED, et al., *Petitioners,*

v.

OHIO-SEALY MATTRESS MANUFACTURING CO., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Respondent Ohio's defense now to the claim of *res judicata* is that at the trial of the 1971 case (*Ohio I*), its future damages were speculative. Yet at that trial Ohio offered no evidence of future damages. Nor did it obtain or even ask the trial court for a ruling that such damages were in fact speculative. Instead Ohio pressed for injunctive relief and damages to the time of trial, both of which it ultimately received. In that case, "Ohio admit[ted] that it made a 'litigation choice' when it filed this suit not to seek future damages caused by Sealy's pre-verdict antitrust conduct." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir. 1982).

Ohio then initiated a series of new cases, one filed in 1976 (*Ohio II*), now before this Court, another filed in 1979 (*Ohio III*) and still another filed in 1982 (*Ohio IV*). When petitioner Sealy attacked the 1979 case on the ground that the 1976 case

was "another action pending," Ohio limited its damages in *Ohio II* to the period from the verdict in *Ohio I* to the filing of *Ohio III*. As a result, there are now four cases arising out of the same facts.

If the doctrine of *res judicata* has any effective force, it must apply in these circumstances. And if the federal courts are to maintain control over the proliferation of litigation, Ohio should be barred from further claims for pre-verdict conduct fully compensated in *Ohio I*.

The issue is not whether Ohio could sue Sealy for any post-verdict repetitions or continuations of pre-verdict conduct. It could, and it did. This case originally involved two kinds of conduct—pre-verdict and post-verdict. The district court adjudicated all the claims for post-verdict acts and its rulings were not appealed. The issue now here is solely whether a plaintiff can reopen a previous final judgment in a second action, or series of successive actions, merely by joining new acts in its pleading seeking additional damages for the acts already adjudicated.

The acts for which Ohio is seeking recovery here in *Ohio II* are petitioner Sealy's retention of specified franchises for itself and failure to make these franchises available to Ohio. It was for this very claim that Ohio received its multi-million dollar damage award in *Ohio I*. In *Ohio I*, the court of appeals affirmed the denial of equitable relief which would have caused Sealy to surrender the franchises in question.

In its brief in opposition, Ohio seeks to avoid the manifest mandate of this Court's ruling in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981) (Pet. Cert., pp. 5-7), by ignoring it. The *Moitie* case is not even cited in the brief in opposition. And respondent makes no attempt to defend the unprecedented "exception" to the doctrine of *res judicata* that the decision below creates—an exception that wholly undermines the policies against relitigation that this Court's decision in *Moitie* requires federal courts to enforce. (The

"exception" would permit reopening the *Moitie* judgment itself by pleading new acts as a continuation of the conduct barred by the first judgment.)

Instead, Ohio invokes but distorts two earlier decisions of this Court. *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322 (1955); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Its argument simply ignores—as did the court below—the distinction made in *Lawlor* between "continuing" acts and completed ones and that *Zenith* made between acts that were barred by the statute of limitations and those occurring before the statute had run. (In so doing, the court of appeals also created a conflict with the Fifth Circuit in construing the *Lawlor* and *Zenith* cases. *See* cases cited in the Petition for Certiorari at pp. 6 and 7.)

The decision below is squarely in conflict with the *Lawlor* opinion. Ohio's quotation of the opinion (Br. in Opp., p. 5) studiously omits the crucial passage immediately following the part quoted, in which this Court stated:

> The conduct presently complained of was all subsequent to the 1943 judgment. . . . While the 1943 judgment *precludes recovery on claims arising prior to its entry*, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

(349 U.S. at 328. Emphasis added.) And since Ohio in this case did sue upon, and did recover for, the post-verdict conduct it complained of, the application of *res judicata* could not confer any "immunity from civil liability for future violations." 349 U.S. at 329. The fact that the court of appeals declined to award divestiture of Sealy's franchises is conclusive that the retention of those franchises is not a continuing or repeated tort analogous to an "abatable nuisance." Neither *Lawlor* nor the "nuisance" law cited by Ohio (Br. in Opp., p. 5) can support the court of appeals' rejection of settled rules of *res judicata*.

Nor does this case involve the "speculative" damages involved in *Zenith*. *Zenith* involved a claim that was never adjudicated because at the time of the unlawful acts in question, the future results of the acts were speculative. In the case at bar, at the time of the acquisitions in issue, it was known that the acquisitions were complete and that Ohio would never receive profits from the acquisitions it lost. Thus, its damages were not speculative. The court below held, however, that new acts after the conclusion of the litigation revived the claim for lost ownership profit damages for these acquisitions. Thus, Ohio may seek the exact same damages in a second suit that it could have sought in the first suit but chose not to for tactical reasons. *Zenith* does not envision a new cause of action under this circumstance.

Indeed, to permit the litigation of Ohio's damage claim under the "speculative damage" exception would pervert that exception. If Ohio failed to prove future damages because it assumed that the franchises would be turned over to Ohio, Ohio made a "calculated choice," *Moitie*, 452 U.S. at 401, "a deliberate tactical decision," *id.* at 403, by which it is bound. The damages for depriving Ohio of the franchises were no more "speculative" than any damages based on losses past, present, and future, resulting from a completed illegal act. Every damage award in a contract case, most in personal injury cases, and all in antitrust suits, must be deemed "speculative" if the damages here can be so treated. Every such case would then be subject to being reopened, perhaps not only by the plaintiff but by the defendant who might prove that the damages awarded turned out to be excessive.

The decision below was plainly in error. More important, however, the error is a rejection of this Court's position in *Moitie*. The "exception" to the principle of *res judicata* created by the court of appeals—that the doctrine does not apply when claims for new acts are pleaded along with adjudicated old ones—threatens an inundation of the federal courts with

revived claims that have been fully adjudicated, creating endless litigation in antitrust cases and other cases as well.

This Court should grant certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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